

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DANIEL KELP,)	
)	
Petitioner,)	Case No. 5:05-cv-13
)	
v.)	Honorable Richard Alan Enslen
)	
KENNETH McKEE,)	
)	
Respondent.)	
)	

ORDER DENYING CERTIFICATE OF APPEALABILITY
AND DENYING LEAVE TO APPEAL *IN FORMA PAUPERIS*

This is a habeas corpus action brought by a state prisoner pursuant to 28 U.S.C. § 2254, in which Petitioner challenges the convictions and sentences imposed upon him on March 16, 2000, after he pleaded guilty as an habitual offender to unarmed robbery, MICH. COMP. LAWS § 750.530, and possession of less than 25 grams of cocaine, MICH. COMP. LAWS § 333.7403(2)(a)(v). On April 15, 2005, the Court entered an order summarily dismissing the petition. The order of dismissal followed the Court's *de novo* review of Petitioner's objections to the Report and Recommendation of the Magistrate Judge. In the order of dismissal, the Court also denied Petitioner a certificate of appealability. Petitioner now has filed a motion to proceed on appeal *in forma pauperis* (Dkt. No. 10). He also has filed a motion renewing his request for a certificate of appealability (Dkt. No. 7).

A prisoner who is unable to pay the required filing fees may seek leave to appeal in a § 2254 action pursuant to Rule 24(a) of the Federal Rules of Appellate Procedure. *Kincade v.*

Sparkman, 117 F.3d 949, 952 (6th Cir. 1997). Petitioner has complied with Rule 24(a), which requires him to file a motion for leave to proceed *in forma pauperis* and an affidavit showing his inability to file the required fees (as prescribed by Form 4 of the Appendix of Forms), his belief that he is entitled to redress, and a statement of the issue he intends to present on appeal. The documents show that, in the last six months, Petitioner has had an average monthly deposit to his prisoner trust account of \$94.86 and that, at the time of filing, he had a spendable account balance of \$368.94. The current appellate filing fee is \$255.00. Petitioner therefore has sufficient resources to pay the appellate filing fee. Accordingly, Petitioner's motion for leave to proceed on appeal *in forma pauperis* will be denied.

Petitioner's renewed request for a certificate of appealability also will be denied. A petitioner may not appeal in a habeas case unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). Amended Rule 22 of the Federal Rules of Appellate Procedure extends to district judges the authority to issue a certificate of appealability. FED. R. APP. P. 22(b). *See Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1073 (6th Cir. 1997).

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court denied Petitioner's application on procedural grounds that it was barred by the statute of limitations. "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it

debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). Both showings must be made to warrant the grant of a certificate. *Id.*

The Court finds that reasonable jurists could not debate that this Court correctly dismissed Petitioner’s claims on the procedural grounds of the statute of limitations and rejected Petitioner’s objections. “Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.” *Id.* Therefore, the Court again will deny Petitioner a certificate of appealability. Accordingly,

IT IS HEREBY ORDERED that Petitioner’s motion for leave to proceed on appeal *in forma pauperis* (Dkt. No. 10) is **DENIED**.

IT IS FURTHER ORDERED that Petitioner’s motion for a certificate of appealability (Dkt. No. 7) is **DENIED**.

DATED in Kalamazoo, MI:
May 19, 2005

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE